UNITED
NATIONS

AT

Administrative Tribunal

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29 May 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 519

Case No. 533: KOFI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Arnold Kean; Mr. Ioan Voicu;

Whereas at the request of Tetteh Kofi, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 9 February, 30 June and 14 November 1988, the time-limit for the filing of an application to the Tribunal;

Whereas at the request of the Applicant and with the agreement of the Respondent, the Tribunal suspended, under article 7, paragraph 5 of its Statute, the time-limit for the filing of an application to the Tribunal until 12 September 1989;

Whereas, on 25 September 1989, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 December 1989, the Applicant, after making the necessary corrections, again filed an application, containing pleas that read in relevant part as follows:

"II. PLEAS

1. With regard to its competence and to procedure, the Applicant respectfully requests the Tribunal:

(a) To find that it is competent to hear and pass judgement upon the present application under article 2 of its Statute;

(b) To find that the present application is receivable under article 7 of its Statute.

2. On the merits, the Applicant respectfully requests the Tribunal:

(a) To find that a legal relationship existed between Appellant and the Respondent based on the contractual obligation which resulted from the offer made by the Director of IDEP [African Institute for Economic Development and Planning] on 13 September 1983 ...

(b) To find that the questions raised in Appellant's letter of acceptance regarding a suggested better starting date, the level of the post and the salary did not operate to defeat his acceptance because they did not materially alter the offer. ...

(c) To find that the ECA [Economic Commission for Africa]/IDEP Director breached his obligation when he failed to send a letter of appointment and all the necessary documents procedurally required by the UN for recruitment of staff, or to send to the Appellant a notice of rescission of the contract after receiving his cable and letter of acceptance. As a result of Respondent's inaction and failure to follow proper recruitment procedure, the Appellant suffered pecuniary losses in the amount of at least $72,852 including some incidental and consequential damages (...). The Tribunal may award this compensation.

(d) To examine the evidence which is available and to find that the reason for the breach is that the position which the Appellant and Respondent had contracted for was encumbered by a former employee, who at that time, together with others, were contesting their termination before the United Nations [Discrimination and Other] Grievances Panel and the Joint Appeals Board (...).

(e) To find that the fixed-term contract (...) under which the Appellant joined IDEP was not renewed due to bad faith. To award a lump sum of money in compensation of two years salary for moral and material injury caused to the Appellant when Respondent terminated him before the expiration of his fixed-term appointment or to order the rescission of the decision to terminate the

Applicant and his reinstatement as a staff member of IDEP, as well as the payment of compensation for injury sustained.

(f) To fix the appropriate amount of compensation, after negotiations with Appellant's counsel, for actual, consequential, and moral damages suffered in respect of this claim (...)."

Whereas the Respondent filed his answer on 30 August 1990;

Whereas the Applicant filed written observations on 30 April 1991, in which he amended his pleas as follows;

"...

2. (g) to fix the amount of compensation for actual, consequential and moral damages to the equivalent of two years net base pay together with interest from the period March 1986 to the present.

(h) to hold oral proceedings on the case to hear the Applicant and his counsel in order to clarify a number of issues that have arisen in the course of the Joint Appeals Board's deliberations and Respondent's answer.

(i) to award costs to the Applicant in the amount of $1000.00."

Whereas, on 1 May 1991, the presiding member of the panel ruled that no oral proceedings will be held in the case;

Whereas the facts in the case are as follows;

In a cable dated 13 September 1983, the Director of the African Institute for Economic Development and Planning (IDEP), in Dakar, Senegal, a subsidiary body of the Economic Commission for Africa (ECA), informed the Applicant, on behalf of the Chairman of the Governing Council of IDEP, that he had been selected for a one-year teaching post at IDEP, at grade L-4, step 4, under the 200 Series of the UN Staff Regulations and Rules. The cable included information concerning salary and other emoluments and stated that the offer was conditional upon a successful medical examination. The Applicant was asked to reply whether the "OFFER [WAS] ACCEPTABLE" and to expedite all necessary arrangements in order to enter the service of IDEP by 15 October 1983, since the academic year was scheduled to commence on 1 November 1983.

In a letter dated 16 September 1983, the Applicant accepted the offer but stated that it would not be possible for him to come in November. He added: "I hope that you will be able to adjust your programme so that I can come at a later date". He also raised questions concerning the salary and the level of the appointment offered and stated that they could be "solved through further communication".

On 20 September 1983, the Applicant sent a cable reading as follows: "PLEASED TO ACCEPT OFFER HOPE WE CAN ARRANGE LATER STARTING DATE DUE TO PRIOR TEACHING COMMITMENT HERE LETTER FOLLOWS".

On 28 September 1983, the Applicant wrote to the Chief, Personnel Section, ECA, referring to the offer he had received and expressing the hope that the grade level offered, as well as the timing of the assumption of his duties could be negotiated. The Applicant sought the Chief of Personnel's advice and help for the resolution of these problems. The Applicant received no response to his communications of 16, 20 and 28 September 1983.

On 5 December 1983, the Applicant wrote to the Director, IDEP, stating that he was committed to coming to IDEP as soon as possible. He also expressed the hope that the Director would be patient so that "the timing problem" could be worked out. He added: "I will be waiting for your call so we can make arrangements for me to come for the month of January and then to start formally in June ...". In a further letter dated 4 February 1984, the Applicant asked the Chief, Personnel Section, ECA, if they could "negotiate the starting grade for the IDEP job".

The Applicant met with the Director of IDEP in New York in early 1984. In a letter of 26 April 1984, the Applicant again asked that his grade and step be changed.

In a letter dated 3 May 1984, the Director of IDEP informed the Applicant that the level of the offer at which he could join the Institute had been "dictated by available post and budget allocations to it". He stated there was nothing he could do to change the offer, except wait until the Applicant arrived at the Institute, when, "after having been integrated in [IDEP's] programmes and community" he could request a reclassification of the post in light of the Applicant's "acquired professorial rank".

On 15 June 1984, the Chief, Personnel Section, ECA, informed the Applicant that the post available at IDEP had been established at the L-4 level and could not be upgraded. He described other allowances that the Applicant would receive under the Staff Regulations and Rules.

In a cable dated 3 August 1984, the Applicant notified IDEP that he was "COMMITTED TO COME ... IN OCTOBER ... IN ACCORDANCE WITH THE TERMS OF THE ORIGINAL CONTRACT CABLED TO [HIM] LAST OCTOBER AND SUBSEQUENT DISCUSSIONS IN NEW YORK LAST MONTH AND IN DAKAR THIS MONTH". He was prepared to start in September. He sought confirmation of "ARRANGEMENTS AS PREVIOUSLY AGREED". He requested, and on 17 August 1984, the Dean of the University of San Francisco approved, an unpaid leave of absence for the academic year 1984-1985. In a further cable dated 20 August 1984, the Applicant stated that he was "READY TO START TEACHING IDEP IN SEPTEMBER".

On 29 August 1984, the Applicant wrote to the Chief, Personnel Section, ECA, stating that, in his view, the earlier offer was still in effect and that he had requested leave of absence from his University in order to come to IDEP. As he had started preparing for his classes, he was "assuming that remuneration for [his] services [would] begin in September". In a cable dated 22 September 1984, the Applicant informed the Chief, Personnel Section, ECA, that he was "READY TO HONOUR IDEP TEACHING CONTRACT" and "FAILED TO UNDERSTAND HOLDUP".

Having received no reply, in a cable dated 11 October 1984, the Applicant requested the Chairman of the IDEP Governing Council to help him resolve the problem of his employment, stating that the Governing Council contract with him was still in effect. On the same date, he sought the assistance of the Executive Secretary, ECA, and summarized in a cable his account of the discussions held with the Director of the Institute since February 1984.

On 18 October 1984, the Applicant wrote to the Personnel Officer for IDEP, and referring to a telephone conversation held the previous month in which the latter had indicated that the contract with the Applicant "had been abrogated", the Applicant set forth his views and position concerning his contractual situation and his understanding that the contract could only be abrogated by the Governing Council.

In a cable dated 12 November 1984, the Director of IDEP informed the Applicant that since he had not been able to comply with the conditions of the offer made to him in September 1983, the post offered to him had been occupied by another, and consequently the offer had expired. In a reply dated 15 November 1984, the Applicant expressed shock on learning that his contract had been abrogated. On the same date, the Applicant asked the

Executive Secretary, ECA, to intercede with the Director of IDEP in order that the latter might reconsider his decision. He stated that "BECAUSE OF AGREEMENT WITH MONTASSER IN JANUARY 1984 AND SUBSEQUENT CORRESPONDENCE I TOOK LEAVE OF ABSENCE WITHOUT PAY" and argued that the Organization could be liable for $60,000 representing gross salary, pension fund, life insurance and health insurance contributions which he had lost when taking a leave of absence from his University.

A further exchange of correspondence ensued between the Applicant and the ECA Administration concerning the decision by the Director of IDEP to withdraw his offer. Finally, on 16 January 1985, the Chief, Personnel Section, ECA, cabled the Applicant an offer of employment as follows:

> "ON BEHALF OF THE CHAIRMAN OF IDEP GOVERNING COUNCIL AM PLEASED TO RENEW UNDER THE 200 SERIES OF THE UNITED NATIONS STAFF RULES OFFER ALREADY MADE TO YOU IN 1983 FOR THE POST OF PROFESSOR AT IDEP FOR ONE YEAR BEGINNING AT THE LATEST END FEBRUARY 1985 SUBJECT TO SATISFACTORY MEDICAL CLEARANCE. OFFER IS AT THE SAME LEVEL GIVEN TO YOU IN OUR PREVIOUS CORRESPONDENCE. AM INSTRUCTED HOWEVER INFORM YOU THAT GOVERNING COUNCIL AFTER EXAMINING YOUR OTHER CLAIMS DECIDED NOT REPEAT NOT ACCEPT ANY OF THE CLAIMS THAT IS THE PAYMENT OF DSA IN NEW YORK, NOR PAYMENT OF SALARY FROM AUGUST 1984 NOR HOST OF TELEPHONE CALLS ETC. BEING MADE BY YOU. GOVERNING COUNCIL ALSO DECIDED THAT UNLESS YOU ACCEPT THIS OFFER AND ASSUME DUTY BY 28 FEBRUARY 85 OFFER WILL BE CONSIDERED AS WITHDRAWN WITHOUT ANY OBLIGATION ON THE PART OF IDEP TO YOU".

On 1 April 1985, the Applicant entered the service of IDEP, on a one-year fixed-term appointment, which was extended for a further period of almost four months. The Applicant separated from the service of IDEP on 22 July 1986.

On 13 March 1985, the Applicant had requested the Secretary-General to review the decision by IDEP not to reimburse him for damages resulting from the alleged breach of contract by the IDEP Administration. Not having received any reply from the Secretary-General, the Applicant, on 7 August 1985, lodged an appeal before the Joint Appeals Board (JAB). The Board adopted its report on 27 April 1987. Its considerations, conclusions and recommendation read as follows:

"Considerations

28. The Panel observed that the appellant's complaint was the result of exchanges of cables, correspondence, telephone calls and an occasional discussion that took place between the appellant and senior officials of IDEP and ECA before he assumed his duties with IDEP in Dakar on 1 April 1985.

29. The Panel examined carefully the chronology of these exchanges, which started with an offer made by the Director of IDEP on 13 September 1983, requesting the appellant, subject to a successful medical examination, to report on 15 October 1983 for work at the L-4 level.

30. The Panel noted that the appellant did not undergo a medical examination, did not report for duty on 15 October 1983 and that he raised questions about the level of the post and the salary, which he sought to renegotiate.

31. The Panel also noted that subsequently by letter of 3 May 1984, the Director of IDEP again offered the appellant a post at the same level as that proposed before but again reservations were made by the appellant. The Panel further noted that it was only on 15 February 1985, that the appellant accepted the terms offered and signed a contract with IDEP.

32. On the basis of the evidence at its disposal and taking into account the events that took place during the period 13 September 1983 - 14 February 1985, the Panel could only conclude that there was no contract during that period and therefore that there could not be a 'breach of contract'. The Panel also agreed that there existed no commitment on the part of the Organization to employ the appellant nor was there any legal expectancy of employment for the period mentioned above. The Panel could not find any evidence of a legal relationship between the appellant and the Organization.

33. During its examination of this appeal the Panel reviewed carefully Administrative Tribunal Judgements which dealt with similar, but not identical cases, namely, Judgements Nos. 96, 106 and 115.

34. On the basis of its analysis of these cases, the Panel considered that it was not competent to review the present case.

35. The Panel then addressed itself to the statement of damages which the counsel for the appellant submitted on 14 April 1987. It noted that the appellant in that

statement had referred to 'the breach of the February 1985 contract', the 'non-payment for March 1985' and ... 'the July 1985 salary issue'.

36. In the Panel's view, the appellant has introduced new, extraneous elements in his appeal, and, in effect, the appellant has sought to expand the scope of the original appeal. The appeal of 7 August 1985, referred to a specific grievance against a decision taken by the Governing Council of IDEP concerning events that took place before he signed his contract on 15 February 1985. The Panel considered that it could not go beyond the appeal of 7 August 1985.

37. Finally, the Panel wished to express its belief that the many telephone calls, cables, discussions and correspondence exchanged between various senior officials and the appellant had contributed to the appellant's 'raised expectations'. More firmness, more frankness, more finesse and more finality by IDEP might have prevented the appellant's grievances.

Conclusions and Recommendation

38. The Panel concluded that in the absence of any legal relationship between the Organization and the appellant before he signed the acceptance of the offer of employment on 15 February 1985, it was not competent to consider this appeal.

39. Therefore the Panel makes no recommendation on this appeal."

On 9 June 1987, the Assistant Secretary-General for Human Resources Management informed the Applicant that: "The Secretary-General has taken note of the Board's unanimous decision not to entertain your appeal because you had not been appointed to any post in the Organization until well after the events to which this appeal relates."

On 27 December 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. A legal relationship existed between the Applicant and the Respondent as a result of the Applicant's acceptance on 16 and 20 September 1983, of the offer made by the Director of IDEP on 13 September 1983.

2. The fixed-term appointment under which the Applicant joined IDEP on 1 April 1985, was not renewed because of bad faith.

Whereas the Respondent's principal contentions are:

1. The appeal against the non-renewal of the Applicant's fixed-term appointment is not receivable because it had not been included in his original appeal to the JAB.

2. The Applicant's claims for costs incurred prior to his appointment were waived by his acceptance of IDEP's offer of appointment.

The Tribunal, having deliberated from 8 to 29 May 1991, now pronounces the following judgement:

I. The Applicant appeals against the Respondent principally on two claims:

(a) The decision of the Respondent not to compensate the Applicant for the pecuniary losses he allegedly suffered and expenses he allegedly incurred prior to his signing a contract with IDEP on 15 February 1985;

(b) The decision concerning the non-renewal of his fixed-term appointment which expired on 22 July 1986.

II. The Applicant has asked for oral hearings. The Tribunal notes that adequate and sufficient material is available to enable the case to be determined without oral proceedings and, therefore, rejects this plea.

III. The Tribunal will deal first with the Applicant's appeal against the decision of the Respondent not to compensate him for the alleged pecuniary losses arising from events which took place before he signed his contract with IDEP on 15 February 1985. The Applicant contends that a legal relationship existed between himself and the United Nations based on an alleged contract which resulted from the offer made by the Director of IDEP on 13 September 1983. The Applicant asserts that he accepted this offer on 16 and 20 September 1983. He claims that a valid contract came into existence when he exercised his power of acceptance of an open offer of employment and when he relied upon such offer to his detriment. The Applicant also contends that such an offer cannot be unilaterally withdrawn prior to the signing of a letter of appointment.

IV. To support his contentions, the Applicant has advanced a number of arguments. In his view, an offer creates a power of acceptance, which, if exercised within a reasonable time, operates to form a contract even though the acceptance states terms additional to or different from those offered or agreed upon, unless the acceptance is expressly made conditional on the offeror's assent to the additional or different terms. Hence, he concludes that a contract was formed and that the Respondent breached that contract by failing to follow the post-contract recruitment formalities, including the sending of a letter of appointment.

V. The Tribunal cannot concur with this conclusion. It observes that the offer made to the Applicant by the Director of IDEP on 13 September 1983, contained two specific conditions: that the Applicant undergo a medical examination and that he report for duty in Dakar on 15 October 1983, for work at the L-4 level. The Tribunal notes that neither of these conditions was fulfilled. The Applicant did not undergo a medical examination and did not report for duty on 15 October 1983. Instead he raised questions and objections regarding the level of the post, the salary and the starting date for his assumption of duties. He sought to renegotiate these fundamental matters from the very beginning of his correspondence with IDEP. The first reaction of the Applicant to the offer made to him on 13 September 1983, is significant in this regard. Instead of answering by cable, as specifically requested, whether the "OFFER [WAS] ACCEPTABLE", the Applicant replied by letter, on 16 September 1983, that it was not possible for him to go to Dakar at the date indicated in the offer and stated: "I hope that you will be able to adjust your programme so that I can come at a later date". In the same letter he also raised questions concerning the salary and the level of appointment offered and emphasized that they could be "solved through further communication". Although on 20 September 1983, he did send a cable purporting to accept the offer, he again appealed for a different starting date and, not receiving a reply, he made no arrangements for a medical examination or for travel to his duty station.

VI. The Tribunal also observes that, by letter of 3 May 1984, the Director of IDEP again offered the Applicant a post at the same level as

that proposed in 1983, but again reservations were expressed by the Applicant. It was only on 15 February 1985, that the Applicant accepted without reservations the offer made to him on 16 January 1985 and signed a contract with IDEP.

VII. In the light of the above, on the basis of the evidence at its disposal and taking into account the events which took place during the period between 13 September 1983 and 14 February 1985, the Tribunal concludes that no contract existed during that period between the Applicant and the United Nations. The Tribunal cannot accept the view of the Applicant that one can simultaneously accept an offer while making it clear that a modification will have to be made in the date for commencement of his professional teaching duties. That date was plainly of the essence for an academic institution such as IDEP, and the offer did not invite further negotiations with respect to it, or to the level of the post, or to the expected salary. When an offeree acts as the Applicant did, his behaviour indicates that a counter-offer is being made or contemplated and, therefore, no legal basis exists for finding that a contract was formed between the Applicant and IDEP.

VIII. In the absence of a contract between the Applicant and IDEP, there could be no breach of contract. Moreover, the evidence shows that no legal commitment existed on the part of IDEP to employ the Applicant, nor was there any legal expectancy of employment for the period 13 September 1983 - 14 February 1985. Thus the Applicant had no reasonable basis, as he claims, for acting to his detriment in reliance on the course of conduct between himself and the Respondent. In fact, during that period, the Tribunal could not identify any legal relationship between the Applicant and IDEP. Therefore, the latter had no obligation to send the Applicant a letter of appointment at that time.

IX. Accordingly, the Tribunal finds that the Applicant is not entitled to be granted the compensation requested by him for the period prior to 15 February 1985.

X. Notwithstanding the foregoing, the Tribunal has examined the totality of circumstances surrounding the events prior to 15 February 1985 and has noted that the behaviour of IDEP and ECA in the present case is susceptible to criticism. The Tribunal concurs with the Joint Appeals Board's (JAB) finding that the many telephone calls, cables, discussions and correspondence exchanged between various senior officials and the Applicant had contributed to the Applicant's mistaken belief that he was entitled to a letter of appointment. The Tribunal suggests, as did the JAB, that more firmness, more frankness, more finesse and more finality might have prevented the Applicant's grievances and would have helped to avoid any confusion or misunderstanding.

XI. While recognizing that the Applicant might have suffered pecuniary losses during the period of his unemployment, the Tribunal does not find any legal responsibility on the part of the Respondent. In this respect, the Tribunal considers that in the absence of a legal relationship between the Applicant and IDEP, the steps taken by the Applicant to change his occupational status and to incur other expenses were at his own risk.

XII. With regard to the Applicant's second claim concerning the non-renewal of his fixed-term appointment which expired on 27 July 1986, the Tribunal observes that the substance of the appeal against the decision of the Respondent not to renew his contract was not considered by the JAB, because that appeal had never been properly submitted, first to the Respondent and then to the Board. The Tribunal therefore finds that this claim is not receivable under article 7 of its Statute because it has not been considered by a joint appeals body, nor has the Respondent agreed to its direct submission to the Tribunal.

XIII. However, the Tribunal notes that the Applicant was employed on a fixed-term appointment. According to staff rule 204.3(d): "A temporary appointment does not carry any expectancy of renewal". Without entering into the merits of the claim, which is not properly before the Tribunal, it may also be noted that there appears to be no evidence of malice or bad faith in the decision not to renew the Applicant's fixed-term appointment beyond 22 July 1986.

XIV. In his written observations on the Respondent's answer, the Applicant has amended the pleas and has introduced a new request to the Tribunal: that he should be awarded costs in the amount of $1,000.

XV. The Tribunal, having rejected the substantive claims, finds there are no grounds, in the absence of special circumstances, for ordering the Respondent to pay costs.

XVI. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Arnold KEAN
Member

Ioan VOICU
Member

Geneva, 29 May 1991

Paul C. SZASZ
Acting Executive Secretary